

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
WILLIAM METZGER :  
for Redetermination of a Deficiency or for :  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law for the Years 1984 and 1985. :

DETERMINATION  
DTA NOS. 808033  
AND 808036

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In the Matter of the Petition :  
of :  
THE CAR STORE :  
for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period June 1, 1985 :  
through November 30, 1985. :

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Petitioner William Metzger, 103 Creekward Drive, West Seneca, New York 14224, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1984 and 1985.

Petitioner The Car Store, 103 Creekward Drive, West Seneca, New York 14224, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1985 through November 30, 1985.

A consolidated hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on July 11, 1991 at 9:15 A.M. No briefs were submitted by any of the parties. Petitioner William Metzger appeared pro se, and for petitioner The Car Store as its sole proprietor. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly determined additional personal income tax

due from William Metzger by utilizing a cash availability audit methodology.

II. Whether the Division of Taxation properly determined additional sales taxes due from The Car Store by using results from an income tax audit of William Metzger.

III. Whether the notice of determination issued against The Car Store was jurisdictionally defective and, therefore, invalid because it failed to contain a statement in bold-faced type that the tax assessment was estimated as required by Tax Law § 1138(a)(2).

#### FINDINGS OF FACT

Petitioner William Metzger, during the years 1984 and 1985, had varied business interests consisting of (1) the ownership and operation of a bar/restaurant known as the Honky Tonk Cabaret in West Seneca (Erie County); (2) two rental properties in 1984, one residential, 3428 Southwestern Boulevard, Orchard Park, New York, and the other commercial, 5200 Seneca Street, West Seneca, New York, and an additional rental property in 1985, 6800 Seneca Street, Elma, New York<sup>1</sup>; and (3) a used car business.

The Division of Taxation issued a Statement of Personal Income Tax Audit Changes dated November 29, 1988 against petitioner William Metzger which asserted additional personal income tax due of \$10,465.52 for 1984 and \$4,099.17 for 1985. Penalties under Tax Law § 685(b) and interest were also asserted as due. The statement showed the following calculation of taxes due:

	<u>1984</u>	<u>1985</u>
Partnership income	\$30,942.50	
Unreported income	33,237.05	
Income from Car Store		\$41,806.87
Capital gain	8,651.00	
Net adjustment	\$72,830.55	\$41,806.87
Taxable income previously stated	10,760.00	(1,940.19)
Net New York income	83,590.55	39,866.68

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<sup>1</sup>On the Federal Schedule E, Supplemental Income Schedule, included in petitioner's 1985 State tax return, petitioner reported rents received of \$9,600.00 on this property, which was reported as acquired in 1986. (Petitioner apparently meant 1985.) The property was described as a frame house, but it is not known whether the property was residential or commercial real estate.

Taxable New York income	83,590.55		39,866.68
Tax on above	\$10,262.68		\$ 4,099.17
Minimum tax	665.84	--	
Corrected tax due	10,928.52		4,099.17
Tax previously computed	463.00	-0-	
	\$10,465.52		\$ 4,099.17

The Division of Taxation then issued a Notice of Deficiency dated February 3, 1989 against Mr. Metzger asserting additional income taxes due of \$14,564.69, plus penalty and interest, for the years 1984 and 1985 (\$10,465.52 for 1984 and \$4,099.17 for 1985 as per the statement of audit changes, supra).

In 1984, Mr. Metzger reported on his State income tax return<sup>2</sup> total New York income of \$13,927.00 consisting of the following:

Interest income	\$ 310.00
Business loss	(2,196.00)
Capital gain	8,922.00
Rents	3,634.00
Partnership income	3,257.00
Total	\$13,927.00

In 1985, Mr. Metzger reported on his State income tax return<sup>3</sup> total New York income of \$1,409.81 consisting of the following:

Interest income	\$ 350.00
Business loss	(4,041.66)
Rents	5,101.47
Total	\$1,409.81

In both 1984 and 1985, Mr. Metzger reported losses from his operation of the Honky

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<sup>2</sup>Mr. Metzger obtained an extension until October 15, 1985 to file his 1984 tax return. According to the application for extension of time to file, Mr. Metzger was "waiting for a partnership K-1 distribution which is necessary to file an accurate and complete tax return."

<sup>3</sup>Attached to Mr. Metzger's 1985 tax return were two duplicate applications for an automatic extension of time, until August 15, 1986, to file. No other applications for extension of time are included in the exhibit. It appears that the 1985 return, which is dated December 1, 1986 and indated December 8, 1986, was filed late.

Tonk Cabaret of \$2,196.18 and \$186.26, respectively, on gross receipts of \$145,833.27 and \$29,338.89,<sup>4</sup> respectively. Ronald P. Pastwich, the Division of Taxation's auditor, who spent 67½ hours on the audit at issue herein, testified that the "operations [of Honky Tonk Cabaret] were correctly reported" by Mr. Metzger on his income tax returns after the auditor reviewed financial documents pertaining to the cabaret. However, the auditor's review of Mr. Metzger's personal checking account raised questions. The auditor testified:

"[T]here was activity that was going through Mr. Metzger's personal checking account itself that we could not quite tie down

exactly what the particular deposits applied [sic]<sup>5</sup> to and what the particular checks being written to cash were made for."

In addition, financial records pertaining to Mr. Metzger's used car business, which in 1984 was a partnership known as Southwood Motors, were inadequate, and there were, according to the auditor, "various large amounts of checks being written to Mr. Metzger from his investment in [Southwood Motors]." Consequently, the auditor testified that in order "to get a better picture of Mr. Metzger's overall financial...interests, we decided we would do...a source and application of funds<sup>6</sup> [audit]."

The auditor detailed the following sources of funds for the year 1984 and where the information was derived from:

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<sup>4</sup>There is no explanation in the record for this dramatic decrease in receipts in 1985.

<sup>5</sup>

The auditor probably meant to use the word "related".

<sup>6</sup>The auditor described a "source and application funds audit" as follows:

"[A]n attempt to determine all the sources of funds that are available to a taxpayer, whether they be from a taxable or a nontaxable [source]. These sources of funds are compared to applications which are, basically, all the expenditures or dollars that go out of a taxpayer's household in a given period, a given year. The two of them are compared. If your applications exceed your sources, well, the general question arises is what funded that overapplication of funds?"

Draws from Southwood Motors - per partnership records	\$ 15,600.00
Business loss from Honky Tonk Cabaret - as reported on tax return	(2,196.00)
Depreciation on loss from Honky Tonk Cabaret - as reported on tax return	11,425.60
Proceeds from sale of land and building - as reported on tax return	70,000.00
Income from two rental properties - as reported on tax return	3,634.00
Depreciation expense on two rental properties - as reported on tax return	1,811.00
Payments to William Metzger from Southwood Motors - per detailed review of checking account of Southwood Motors	120,704.00
Less: (1) rental payments on 5200 Seneca Street, West Seneca which is included above in the line for income from two rental properties, and (2) draws from Southwood Motors shown above	(5,220.00) (15,600.00)
Balance in Permanent bank account #7010011081 at 1/19/84 - per bank statement	9,192.30
Balance in Norstar bank account #4645-006 at 1/16/84 - per bank statement	5,732.98
Interest income - as reported on return	<u>310.00</u>
Total Sources	\$215,393.88

The auditor detailed the following application of funds for the year 1984 and where the information was derived from:

Balance in Permanent bank account #7010011081 at 12/31/84 - per bank statement	\$ 44,949.44
Balance in Norstar bank account #4645-006 - per bank statement	5,940.63
Payments of Citibank line of credit - from bank statements	3,010.04
Checks written from Permanent bank account #7010011081 - per detailed schedule after review of cancelled checks	191,827.99
Assets purchased in 1984 - per review of depreciation schedules	<u>2,902.83</u>
Total Applications	\$248,630.93

The auditor determined an overapplication of funds for 1984 of \$33,237.05 (\$248,630.93 less \$215,393.88). It is observed that this calculation was a revision of an earlier one based upon additional data obtained by the auditor at two meetings during early August of 1988.

The auditor also calculated a capital gain in 1984 from Mr. Metzger's sale of his partnership interest in Southwood Motors as follows:

Amounts received as repayments from Southwood Motors -

per check register of Southwood Motors and analysis of checks to Mr. Metzger	\$20,215.00
Amount of inventory received from Southwood Motors <sup>7</sup>	<u>63,537.00</u>
Total	\$83,752.00
Less: Mr. Metzger's interest per partnership return	<u>62,125.00</u>
Gain	\$21,627.00
Less: Capital gain deduction	<u>12,976.00</u>
Capital Gain	\$ 8,651.00

For 1984, in addition to the auditor's determination of unreported income of \$33,237.05 and of an unreported capital gain of \$8,651.00, the auditor determined additional partnership income of \$30,942.50 after a separate and distinct audit of Southwood Motors for 1984. The auditor testified:

"What we did is we examined the various books and records such as the cash disbursements journal, the cash receipts journal, the bank statements that were supplied to us by Southwood Motors itself."

The auditor disallowed as partnership business expense deductions the following checks written to Mr. Metzger:

<u>Check Number</u>	<u>Amount</u>	<u>Reason for Disallowance</u>
4403	\$ 2,046	No substantiation
4481	4,700	No substantiation
4485	1,980	No substantiation
4551	5,000	Loan repayment
4642	5,000	Loan repayment
4673	1,150	No substantiation
4689	5,000	Loan repayment
4722	3,800	Boat - not a business expense
4736	4,215	Loan repayment
4951	1,200	No substantiation
4966	3,987	No substantiation
5027	7,207	Appears to be deducted twice
5055	<u>1,000</u>	Loan repayment
	\$46,285	

In addition, the auditor disallowed as partnership business expense deductions the total amount

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<sup>7</sup>According to a detailed schedule prepared by the auditor, Mr. Metzger received 30 cars from Southwood Motors. (Mr. Metzger subsequently transferred such cars to The Car Store.) The auditor averaged the high wholesale and low wholesale values for such cars, which he took from National Car Dealers' Association ("NADA") trade books, in calculating the value of the inventory of cars received by Mr. Metzger from Southwood Motors shown above.

of draws paid to Mr. Metzger during 1984 of \$15,600.00 (52 weeks x \$300.00). As a result, partnership income was increased by \$61,885.00 (\$46,285.00 + \$15,600.00). Since Mr. Metzger and Edward Gorczyca were 50% partners in Southwood Motors, one-half of the increase in partnership income, or \$30,942.50, was allocated to Mr. Metzger.

For 1985, the auditor determined that The Car Store had an understatement of gross receipts of \$163,672.73 by analyzing its checking account which was opened in the early part of April 1985. From the opening date to the end of 1985, the auditor found \$252,458.57 of deposits. He then subtracted "items which would have been reflected somewhere else in a tax return...some rents and some lease dollars that were received by Mr. Metzger" in the amount of \$28,800.00 to calculate so-called "net deposits" from The Car Store's operations of \$223,658.57. To calculate The Car Store's "total receipts", the auditor also calculated expenditures made in cash of \$21,040.36 as follows:

Purchases from Schedule "C" of Mr. Metzger's 1985 tax return	\$211,295.02
Business expenses (less depreciation) from the Schedule "C"	38,856.58
Checks written per bank statement less amount of checks expensed on the Schedule "C" <sup>8</sup>	<u>18,274.91</u>
Total	\$268,426.51
Less: checks written	<u>(247,386.15)</u>
Cash expenditures	\$ 21,040.36

"Total receipts" of \$244,698.93 were then calculated by adding the "net deposit" from The Car Store's operations of \$223,658.57 and cash

expenditures of \$21,040.36. The understatement of gross receipts of \$163,672.73 was computed by subtracting total receipts as reported on the Schedule "C" of \$81,026.20 from "total receipts" of \$244,698.93.

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<sup>8</sup>The auditor assumed that the difference between these two amounts was non-business expenses. Apparently, if they were business expenses, they would have been deducted or "expensed" on the Schedule "C".

Based upon the gross receipts per audit of \$244,698.93, the auditor recomputed Mr. Metzger's profit from The Car Store as follows:

Gross receipts - per audit	\$244,698.93
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Cost of Goods Sold:

Beginning inventory - per audit	\$63,537.00 <sup>9</sup>	
Autos purchased - per audit	68,093.38	
Parts purchased - per audit	52,696.00	
Ending inventory - per audit	(30,732.50) <sup>10</sup>	
Cost of Goods Sold		153,593.88
Gross profit		\$ 91,105.05

Deductions (as reported on Schedule "C")

Advertising	\$ 486.99
Depreciation	3,200.00
Dues	5.00
Insurance	3,431.91
Mortgage interest	6,609.83
Office expense	194.41
Rent	450.00
Repairs	3,016.81
Taxes	19,660.77
Utilities	3,103.39
Wages	2,729.55
Licenses	407.00

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<sup>9</sup>As noted in Footnote "7", supra, Mr. Metzger received 30 cars from Southwood Motors which he subsequently transferred to The Car Store. The auditor valued the 30 cars by utilizing NADA trade book wholesale values. The total valuation of \$63,537.00 noted supra was also used as the value for the beginning inventory of The Car Store.

<sup>10</sup>The ending inventory was also estimated by utilizing wholesale values in NADA trade books. According to the auditor, invoices showing how much The Car Store paid for the cars included in the ending inventory were never provided so that a reasonable estimate of their value was made by using the trade books.

Subcontract	3,440.00	
Miscellaneous expenses	<u>227.92</u>	
Total deductions		\$ 36,943.58
Net profit per audit (\$91,105.05 less \$36,943.58)		\$ 54,161.47
Net loss as reported		<u>(3,855.40)</u>
Amount of adjustment		\$ 58,016.87

Subsequently, the auditor reduced the adjustment based upon two checks, one for \$11,910.00 and the other for \$4,300.00, written by Southwood Motors that were allowed as expenses of The Car Store. Therefore, income from The Car Store was revised downwards to \$41,806.87 (\$58,016.87 less the two checks, \$11,910.00 and \$4,300.00). As noted in Finding of Fact "2", supra, this income from The Car Store of \$41,806.87 resulted in tax due of \$4,099.17.

The auditor also calculated additional sales tax based upon the understatement of gross receipts by The Car Store of \$163,672.73, as computed in Finding of Fact "9", supra.

According to the auditor:

"We recomputed sales tax basically because of the fact that since the income...came from a taxable source as far as sales tax itself was concerned."

The additional receipts of \$163,672.73 were evenly distributed over each of the six months included in the quarters ending August 31, 1985 and November 30, 1985 because The Car Store's book of registry did not reflect the purchase of any cars until June 1985. Therefore, additional monthly receipts of \$27,278.79 were calculated (\$163,672.73 divided by 6). Sales tax due for each of the quarters at issue was calculated as follows:

Quarter Ending August 31, 1985

Gross sales - as reported	\$ 31,678.00
Additional sales - \$27,278.79 x 3	<u>81,836.37</u>
Total sales (taxable) - per audit	113,514.37
Taxable sales - as reported	<u>31,678.00</u>

Additional taxable sales		81,836.37
Rate	<u>8%</u>	
Sales tax due		\$ 6,546.91

Quarter Ending November 30, 1985

Gross sales - as reported		\$ 24,810.00
Additional sales		<u>81,836.37</u>
Total sales (taxable) - per audit		106,646.37
Taxable sales - as reported		<u>21,310.00</u>
Additional taxable sales		85,336.37
Rate	<u>8%</u>	
Sales tax due		\$ 6,826.91

The Division of Taxation issued a Statement of Proposed Audit Adjustment dated August 12, 1988 asserting total sales tax due of \$13,373.82, plus penalty and interest, for the period June 1, 1985 through November 30, 1985. The statement noted it was based on an "audit of records". A Notice of Determination and Demand for Payment of Sales and Use Taxes Due, also dated August 12, 1988, was issued assessing sales taxes due of \$13,373.82, plus penalty and interest. On the face of the notice under the subheading "Explanation" was an unchecked box next to the following statements printed in bold type:

**"THE TAX ASSESSED ABOVE HAS BEEN ESTIMATED IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1138(a)(1) OF THE TAX LAW.**

**IF THE BOX ABOVE IS CHECKED SEE ADDITIONAL INFORMATION ON BACK OF THIS NOTICE. IF THE BOX ABOVE IS NOT CHECKED, THE TAX HAS NOT BEEN ESTIMATED."**

Underneath the bold type in regular typed format was the following statement:

"The following taxes have been determined to be due in accordance with Section 1138 of the Tax Law, and are based on an audit of your records."

Mr. Metzger, who appeared pro se with regard to his income tax assessment and on behalf of his sole partnership, The Car Store, with regard to the sales tax assessment, presented very little evidence in opposition to the assessments.<sup>11</sup> Only two documents were introduced

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<sup>11</sup>It is further noted that, in the course of the audit, commenced in December 1986 and completed approximately two years later, petitioners were provided with several opportunities to document other nontaxable sources of income. They failed to do so, other than the allowance of two Southwood Motors checks as business expenses of The Car Store as noted in Finding of Fact

into evidence. Petitioners' Exhibit "1" is a certified copy of a "Certificate of Conducting Business under an Assumed Name" which was filed by Mr. Metzger with the Erie County Clerk on April 1, 1985. Mr. Metzger certified that he was "conducting or transacting business under the name or designation of The Car Store at 5200 Seneca, West Seneca, County of Erie."

Petitioners' Exhibit "2" is an affidavit dated October 29, 1986 of Edward Gorczya, who was Mr. Metzger's partner in Southwood Motors. The affidavit stated as follows:

"In 1983 William Metzger opened up a new business known as the Honky Tonk Carbet [sic] and could not run both businesses. At that time I took over the used car lot business. Then gave Mr. Metzger \$300 a week for the inventory that was left on the car lot at that time."

Mr. Metzger testified that he started a used car business in 1957, then also known as The Car Store. The evolution of The Car Store into Southwood Motors and back to The Car Store was described in an indistinct way, difficult to decipher:

"ADMINISTRATIVE LAW JUDGE: You started Southwood Motors in 1957?

MR. METZGER: Well, it used to be The Car Store, and then I changed it to Southwood Motors. When they took it over, it went from The Car Store to Southwood Motors, but I left the inventory there because you can't run a business with no money, with no inventory.

ADMINISTRATIVE LAW JUDGE: When Eddie Gorczya took it over?

MR. METZGER: The inventory was always mine. I just left it there. And I worked with these guys for years. There was never any problems, you know, money wise or arguing or nothing.

ADMINISTRATIVE LAW JUDGE: And you never received inventory back from --

MR. METZGER: In the end, I did. When I went from Southwood Motors to The Car Store, then I took my inventory back, I just transferred it.... And prior to that, it was money. When he would sell a car, then he would give me the money for the car, and I would let him keep the sales tax because he was liable for it<sup>12</sup>...and I gave him half of the profit. We made 600, I took 3, he got 3. I was

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"10", supra.

However, the sales tax assessed was not for the period that Southwood Motors conducted the

always fair with the guys."

As noted in Finding of Fact "6", supra, Mr. Metzger received payments from Southwood Motors of \$120,704.00. Mr. Metzger testified that he used some unspecified portion of such payments to purchase cars up in Canada:

"And when you go to Canada, you have to buy with cash; they won't accept a check.... Now, you know, 10,000, 8,000, buy cars, bring them back, take the money, go back next week, buy a few more, you know, and I used to be able to make a few bucks doing that. That's where all the cash came from."

Mr. Metzger testified that he showed a "pile of receipts...from the Toronto Auto Auction" to the auditor. None, however, were introduced at the hearing.

Mr. Metzger candidly admitted that "everything got to be such a mess", but he "didn't know it". The culprit was his bookkeeper:

"My bookkeeper moved to Florida, and when he moved to Florida, he gave his business to his associates and they didn't do nothing. It was only just a young guy out of college or whatever, and here I am sending him a check every month to do the bookwork and he never done it."

#### SUMMARY OF THE PARTIES' POSITIONS

The Division of Taxation maintains that an "exhaustive audit was done in this matter, and...the petitioner [was given] opportunities at every juncture to explain discrepancies, to supply documentation, to account for discrepancies", and petitioners failed to do so. The source and application of funds audit provided a rational basis for the 1984 income tax assessment. Further, the exhaustive review of the bank statements of The Car Store provided a rational basis for the 1985 income tax and sales tax assessments. Petitioners failed to provide any explanation why the approximately \$200,000.00 deposited into The Car Store account was not income:

"[I]f this was a loan, if this was something else that was not income, fine, he was given many opportunities to show us that, and he didn't do it."

In addition, the Division of Taxation's representative, in her closing argument, maintained that the notice of determination was not jurisdictionally invalid:

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used car business. Mr. Metzger's contention that the sales tax liability "belonged to Southwood Motors" was irrelevant.

"I would like to raise one technical point, because I understand there's a case currently on appeal, having to do with the notice of determination and demand itself.... [T]here's a checkoff that was not checked off saying this was an estimate assessment. I don't believe that that applies to this proceeding, because...I think that that had in mind more when you were doing an estimated assessment of a sales tax and you use markups or you use some other type of external indices.

In this case, these -- the sales tax assessment was generated as a result of a complete analysis of actual records, so I don't believe the question of whether or not this is an estimated assessment should arise. It was based on the actual analysis of the bank analysis [sic] [statements] for The Car Store, so I don't believe you can call this an estimated assessment or that we didn't advise the petitioner this was an estimated assessment.

[A]lternatively I would argue that since that -- the question of the document is under appeal in another case, I don't believe that you can simply throw out that document based on the question of whether or not it was an estimate."

Mr. Metzger maintains that he paid income tax on income he received from the sale of used cars. In the petition of The Car Store, it is contended that Southwood Motors accounted for the sales of The Car Store. Further, petitioners maintain that NADA trade values should not have been utilized because used car businesses (apparently as distinguished from new car dealers who sell used cars) never can obtain such high prices for their used cars.

#### CONCLUSIONS OF LAW

A. The Tax Appeals Tribunal has recognized the validity of a source and application of funds audit (also known as a cash availability audit) to determine unreported taxable income (Matter of Lee, Tax Appeals Tribunal, October 11, 1990; Matter of R & J Automotive, Inc., Tax Appeals Tribunal, June 15, 1989). In fact, in income tax matters, it is not even necessary that the taxpayer's books and records be deemed inadequate before a source and application of funds audit may be conducted. In Matter of Lee (supra), the Tribunal noted that:

"[I]n Matter of Giuliano v. Chu (135 AD2d 893, 521 NYS2d 883)...the court determined that '[a]n initial consideration of inadequate or incomplete books and records before employing an indirect method is normally only required in sales and use tax cases where the tax is imposed upon verifiable receipts evidenced by statutorily required books and records' [citation omitted]."

B. The audit of Mr. Metzger resulted in a determination that, in 1984, his sources of income were less than his expenditures, as detailed in Finding of Fact "6", supra. It was reasonable for the Division of Taxation to treat the overage as additional income in 1984.

Furthermore, the situation here is almost identical to that in Lee (supra) and Giuliano (supra), where the Tribunal and court, respectively, sustained determinations of unreported taxable income because of the "petitioners' failure to present any substantiating evidence other than [the taxpayer's] own, rather nonspecific, testimony" (Matter of Giuliano v. Chu, supra, 521 NYS2d 883, 886, as quoted by the Tribunal in Lee, supra). Therefore, Mr. Metzger's contentions noted in paragraph "18", supra, are rejected.

C. However, it would appear that the additional partnership income of \$30,942.50, as determined by an analysis of the operations of Southwood Motors, was subsumed by the source and application of funds audit. A careful review of the record reveals that Mr. Metzger's unreported income (as calculated by use of the source and application of funds audit) was, more than likely, derived from his used car business. In other words, the used car business funded the overapplication of funds. Therefore, it was not reasonable to increase Mr. Metzger's income tax liability by using an additional analysis of Southwood Motors' checking account deposits.

In Matter of Joseph Petito (Tax Appeals Tribunal, October 17, 1991), the Tribunal decided that one-half of additional corporate income was properly attributed to a 50% shareholder of the corporation "absent an explanation as to the disposition of the additional corporate income." However, it is important to observe that in Petito, the Division of Taxation did not also perform a source and application of funds audit of the taxpayer. To do so would have led to a duplication of the additional corporate income which had been attributed to Mr. Petito from the corporation in which he was a 50% shareholder. Consequently, such portion of the income tax assessment herein for 1984, relating to the additional partnership income, should be cancelled.

D. The auditor's analysis of the bank deposits of The Car Store which resulted in the 1985 income tax assessment against Mr. Metzger was also rational. Once again, Mr. Metzger's rather nonspecific testimony was inadequate to sustain his burden of proof, imposed pursuant to Tax Law § 689(e), to show the assessment was in error.

E. However, as noted in paragraph "17", supra, the Division of Taxation's representative

raised the issue concerning the validity of the notice of determination assessing sales tax against The Car Store. This issue was apparently raised due to the representative's concern that the reasoning of the administrative law judge in Matter of Cheakdkaipejchara (Division of Tax Appeals, March 7, 1991), might be adopted herein. Although I am cognizant that, pursuant to Tax Law § 2010(5), the administrative law judge's decision in Cheakdkaipejchara (supra) has no force or effect in this proceeding, Tax Law § 1138(a)(2), which was adopted along with other amendments to the Tax Law in a bill that became known as the "Taxpayer's Bill of Rights" (Memorandum of the Division of Budget, Buffalo Evening News [June 30, 1979, B-2], Governor's Bill Jacket, L 1979, ch 714), must also be reviewed for purposes of this determination.

F. Tax Law § 1138(a)(2) provides as follows:

"Whenever such tax is estimated as provided for in this section, such notice shall contain a statement in bold face type conspicuously placed on such notice advising the taxpayer: that the amount of the tax was estimated; that the tax may be challenged through a hearing process; and that the petition for such challenge must be filed with the tax commission within ninety days." (Emphasis added.)

An "estimated tax" for purposes of this statutory provision encompasses a broad spectrum of "tax due" calculations. In his memorandum in support of the "Taxpayer's Bill of Rights", the Commissioner of Taxation and Finance took issue with the broad scope of this notice requirement. He stated that:

"The requirement of such statement would appear to be relevant where the amount of tax due is determined by the Tax Commission from information as may be available to it other than an audit of the books and records of the taxpayer. In the latter case, some estimating or statistical techniques are used. The proposed amendment should be clarified to exclude estimated assessments based on audits when the taxpayer would be aware of any estimating techniques used." (Governor's Bill Jacket, L 1979, ch 714.)

However, the bill was not so clarified. There can be no doubt that this notice requirement applies to the situation at hand. Clearly, the sales tax assessment herein was not based upon an analysis of sales invoices maintained by The Car Store. Rather, it was based upon an income tax audit that had estimated additional income from Mr. Metzger's used car business, known as The Car Store, by treating all deposits to its checking account as income. Such analysis is

encompassed by the following provision in Tax Law § 1138(a)(1) that authorizes the estimating of sales tax due:

"If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors." (Emphasis added.)

This emphasized term, "or other factors", would include deposits to a business checking account, which were used as a basis for estimating sales. Consequently, since the sales tax assessment herein was estimated, failure to comply with the mandatory notice requirement of Tax Law § 1138(a)(2) invalidates the statutory notice as jurisdictionally defective (cf., Levitt v. Commissioner of Internal Revenue, 97 TC 30).

G. The petition of William Metzger is granted to the extent indicated in Conclusion of Law "C", supra, and the Notice of Deficiency dated February 3, 1989 is modified to so conform, but, in all other respects, the petition of William Metzger is denied. The petition of The Car Store is

granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated August 12, 1988 is cancelled.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE